

**UNITED STATES DISTRICT COURT  
DISTRICT OF CONNECTICUT**

ERIC FLOYD,  Petitioner,  v.  BRIAN MURPHY,  Respondent.	: : : : : : : : : :	          PRISONER Case No. 3:01cv1221(CFD)(WIG)
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**RULING AND ORDER**

The petitioner, Eric Floyd ("Floyd"), brings this action pro se and in forma pauperis for a writ of habeas corpus, pursuant to 28 U.S.C. § 2254, challenging his conviction on charges of murder, commission of a felony with a firearm and criminal possession of a firearm. Floyd has filed motions seeking a stay of this case, an evidentiary hearing and appointment of counsel.<sup>1</sup> For the reasons set forth below, Floyd's motion to stay is granted and his motions for appointment of counsel and evidentiary hearing are denied.

**I. PROCEDURAL BACKGROUND**

In December 1995, after a jury trial in the Connecticut Superior Court for the Judicial District of Fairfield, Floyd was convicted of murder, commission of a felony with a firearm and criminal possession of a firearm. He was found not guilty of attempted murder. In January 1996, he was

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<sup>1</sup>The motion is described as one requesting reconsideration of United States Magistrate Judge William I. Garfinkel's ruling denying the appointment of counsel, but will be considered as a new motion to this Court.

sentenced to a total effective term of imprisonment of fifty-five years.

On direct appeal to the Connecticut Supreme Court, Floyd challenged his conviction on three grounds: (1) the trial court improperly instructed the jury on the law of accessory liability; (2) the state failed to disclose impeachment evidence relating to the testimony of one of the state's witnesses thereby violating his constitutional right to due process; and (3) the state's attorney improperly made a "missing witness" argument during closing argument. The Connecticut Supreme Court vacated the conviction for commission of a felony with a firearm, affirmed the convictions for murder and criminal possession of a firearm and affirmed his sentence. See State v. Floyd, 253 Conn. 700, 702-03, 756 A.2d 799, 803 (2000).

In June 2001, Floyd commenced this action. He asserts as grounds for relief in this petition the second and third grounds raised on direct appeal.

On June 25, 2002, Floyd filed a motion for evidentiary hearing. He states that on May 14, 2002, he obtained exculpatory documents from the Bridgeport Police Department. Floyd indicates that this information was not disclosed to Floyd or his attorney during his state criminal trial and suggests that the Bridgeport Police Department may have other, similar, information. On July 18, 2002, Floyd filed a motion for stay. He states that he must present this new information to the state courts before he can amend his federal habeas petition to include a claim based upon the newly discovered information. The respondent has not opposed the motion for stay but opposes the motion for evidentiary hearing.

## **II. STANDARD OF REVIEW**

A prerequisite to habeas corpus relief under 28 U.S.C. § 2254 is the exhaustion of all available state remedies. See O'Sullivan v. Boerckel, 526 U.S. 838, 842 (1999); Rose v. Lundy, 455 U.S.

509, 510 (1982); Daye v. Attorney General of the State of New York, 696 F.2d 186, 190 (2d Cir. 1982), cert. denied, 464 U.S. 1048 (1982); 28 U.S.C. § 2254(b)(1)(A). The exhaustion requirement is not jurisdictional; rather, it is a matter of federal-state comity. See Wilwording v. Swenson, 404 U.S. 249, 250 (1971) (per curiam). The exhaustion doctrine is designed not to frustrate relief in the federal courts, but rather to give the state court an opportunity to correct any errors which may have crept into the state criminal process. See id. "Because the exhaustion doctrine is designed to give the state courts a full and fair opportunity to resolve federal constitutional claims before those claims are presented to the federal courts, . . . state prisoners must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process." See O'Sullivan, 526 U.S. at 845.

The Second Circuit requires the district court to conduct a two-part inquiry. First, the petitioner must have raised before an appropriate state court any claim that he asserts in a federal habeas petition. Second, he must have "utilized all available mechanisms to secure appellate review of the denial of that claim." Lloyd v. Walker, 771 F. Supp. 570, 573 (E.D.N.Y. 1991) (citing Wilson v. Harris, 595 F.2d 101, 102 (2d Cir. 1979)). "To fulfill the exhaustion requirement, a petitioner must have presented the substance of his federal claims to the highest court of the pertinent state." Bossett v. Walker, 41 F.3d 825, 828 (2d Cir. 1994), cert. denied, 514 U.S. 1054 (1995) (internal citations and quotation marks omitted). See also Pesina v. Johnson, 913 F.2d 53, 54 (2d Cir. 1990) ("[T]he exhaustion requirement mandates that federal claims be presented to the highest court of the pertinent state before a federal court may consider the petition."); Grey v. Hoke, 933 F.2d 117, 119 (2d Cir. 1991) (same).

In addition, there is a one-year limitations period applicable to habeas corpus petitions filed pursuant to 28 U.S.C. § 2254. The limitations period commences on the expiration of direct review. See 28 U.S.C. § 2244(d)(1)(A). The Second Circuit has held that the period for direct review includes the time within which a criminal defendant may file a petition for writ of certiorari with the United States Supreme Court, even if the criminal defendant does not seek certiorari. See Williams v. Artuz, 237 F.3d 147, 151 (2d Cir.) (holding in case where petitioner had appealed to state highest court, direct appeal also included filing petition for certiorari to Supreme Court or the expiration of time within which to file petition), cert. denied, \_\_\_ U.S. \_\_\_, 122 S. Ct. 279 (2001). The limitations period is tolled by the filing of a state habeas petition, but not by the filing of a federal habeas petition. See 28 U.S.C. § 2244(d)(2); Duncan v. Walker, 533 U.S. 167, 181-82 (2001).

### **III. DISCUSSION**

Although the claims currently contained in this petition appear to have been exhausted, Floyd has expressed his intention to amend the petition after he exhausts his state court remedies with regard to a claim based upon the new information. If the information proves to be exculpatory, the state court may afford Floyd the relief he seeks in this petition.<sup>2</sup>

If Floyd had filed an amended complaint containing this new claim, the petition would likely become a mixed petition, containing exhausted and unexhausted claims. The United States Court of Appeals for the Second Circuit has cautioned the district courts not to dismiss a mixed petition containing exhausted and unexhausted claims where an outright dismissal would preclude the petitioner

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<sup>2</sup>Floyd has apparently filed a state habeas corpus petition. See Respondant's Opp. to Pet.'s Mot. for Evidentiary Hearing [Doc. # 17], at 4.

from having all of his claims addressed by the federal court. The Second Circuit advised the district courts to stay the petition to permit the petitioner to complete the exhaustion process and return to federal court. See Zarvela v. Artuz, 254 F.3d 374, 380-83 (2d Cir.) (recommending that the district court stay exhausted claims and dismiss unexhausted claims with direction to timely complete the exhaustion process and return to federal court "where an outright dismissal 'could jeopardize the timeliness of a collateral attack.'"), cert. denied sub nom. Fischer v. Zarvela, \_\_\_ U.S. \_\_\_, 122 S. Ct. 506 (2001).

Because Floyd has expressed his intent to amend this petition once he has exhausted his state court remedies, the court considers this petition to be tantamount to a mixed petition. Were the court to dismiss this petition without prejudice to refiling after Floyd exhausts his state court remedies, Floyd would be time-barred from refiling the claims now contained in his federal habeas petition.

Accordingly, Floyd's Motion for Stay [**doc. #20**] is **GRANTED** with the following two conditions:

(1) Floyd shall file a petition for writ of habeas corpus in state court raising his new claim (or demonstrating that this new claim has already been raised in a pending state habeas petition) within **thirty** days from the date of this order and submit to this court, within **forty** days from the date of this order, evidence that the state habeas petition that was filed included this claim or that a new state habeas petition includes this claim.

(2) Within **thirty** days following the issuance of a decision by the Connecticut Supreme Court on the appeal of any adverse decision on the state habeas petition or the denial of certification to appeal by the Connecticut Supreme Court, Floyd shall file an affidavit or declaration in this case reporting that the state habeas petition has been disposed of and that he wishes to terminate the stay of this case. The affidavit or declaration shall be accompanied by an amended petition including the new claim.

If Floyd fails to comply with either requirement, this court will terminate the stay and issue its decision

on the federal habeas petition in its present form.

In light of the stay granted in this case, Floyd's motions for appointment of counsel [**doc. #18**] and evidentiary hearing [**doc. #19**] on the federal petition are **DENIED** as moot.

**SO ORDERED** this \_\_\_\_ day of March, 2003, at Hartford, Connecticut.

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**Christopher F. Droney**  
**United States District Judge**